FILED
001142 JAN 02 2001
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No.

In the
Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

ANDRE DELAWARE,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether, under appropriate circumstances, the public safety doctrine, which is firmly embedded in Fourth Amendment jurisprudence, serves to extend the scope and the duration of a lawful *Terry* stop.

Assuming the officers exceeded the scope of a lawful *Terry* stop, did the Appellate Court err in determining that respondent's consent to search was obtained through the exploitation of an unlawful arrest where the officers were not required to give respondent *Miranda* warnings and where there was no evidence that the officers embarked on an investigation of the car for the purpose of finding incriminating evidence.

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The opinion of the Appellate Court of Illinois, First District, First Division, which suppressed the evidence and reversed respondent's conviction, was entered June 12, 2000, and is reported at 314 Ill. App. 3d 363, 731 N.E.2d 904 (1st Dist. 2000), and is reproduced in Appendix A of this Petition. The unreported order denying Petitioner's Petition for Rehearing was entered on July 13, 2000, and is reproduced in Appendix B of this Petition.

The unreported order of the Illinois Supreme Court, which denied Petitioner's timely Petition for Leave to Appeal, was entered on October 4, 2000 and is reproduced in Appendix C of this Petition.

The order of the circuit court denying respondent's motion to suppress is unreported.

STATEMENT OF JURISDICTION

The order and judgment of the Appellate Court of Illinois, First District, First Division was entered on June 12, 2000. A Petition for Rehearing was filed on July 3, 2000. That petition was denied on July 13, 2000. On August 17, 2000, a Petition for leave to Appeal to the Illinois Supreme Court was filed, and subsequently denied on October 4, 2000.

This Petition for a Writ of Certiorari is filed within 90 days of that order as required by Rule 13(1) of the Rules of the Supreme Court. The decision of the Illinois Appellate Court, First District, First Division was explicitly based on federal Constitutional law, in particular on the Fourth and Fourteenth Amendments. Ac-

cordingly, the jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supporting by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Fourteenth Amendment to the United States Constitution provides:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 19, 1997, respondent, Andre Delaware, was charged by indictment with one count of possession of a controlled substance with intent to deliver. (CL. 7) Respondent filed a motion to quash arrest and suppress evidence alleging that no probable cause or exigent circumstances existed for his arrest. A hearing on respondent's motion was held on April 24, 1998. (CL. 20-21).

The only witness called upon to testify at the hearing on respondent's motion was Chicago Housing Authority Police Officer Jesse Kuykendoll. Officer Kuykendoll testified that he and his two partners heard gunshots while working at 51st and State Streets, which is a CHA 16-story high-rise building that is part of the Robert Taylor Homes. (R. B4-7). The shots came from around 5135 South Federal Street, which was no more than 100 to 150 yards away from the officers. (R. B7). As shots continued to be fired, the officers went to that area and pulled into a parking lot, where a foot chase of several men ensued. (R. B7). As the officers chased the men, they noticed a parked Jeep Cherokee.[1] (R. B7-8). However, the officers did not stop at the Jeep Cherokee at this point, but continued the pursuit of the

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[1] Notably, the Appellate Court, in its published opinion, misstated certain facts with respect to the location of the Jeep. The opinion indicates that the parking lot where the police began the chase of the men suspected of firing shots and the parking lot where the officers encountered defendant in the Jeep were two different lots. *People v. Delaware*, 314 Ill. App. 3d 363, 365, 731 N.E.2d 904 (1st Dist. 2000). However, the record concretely establishes that the parking lot where the officers began to chase the group of men suspected of firing shots and the parking lot where the officers encountered defendant and the Jeep were one and the same. (R. B7-8, 18-19). Also see, defense counsel's argument at suppression hearing and the trial court's findings. (R. B30-31). Unfortunately, the Appellate Court of Illinois denied Petitioner's Petition for Rehearing wherein the People asked the Appellate Court to correct the misstatement of facts and reconsider the issue accordingly. However, it is the People's position that the protective search of the vehicle was justified under either factual scenario since the Jeep was in the general area where the shots were fired. Officer Kuykendoll testified that when they chased the group of suspects they saw the Jeep.

men. (R. B8). The officers chased the men into 5135 South Federal, but lost them in the staircase. (R. B7).

As the officers returned to the parking lot to look for dropped weapons or shell casings, Officer Kuykendoll observed respondent jump out of the Jeep Cherokee and run away from the approaching officers. (R. B8). The Jeep was about 20 yards away from the approaching officers. (R. B8). When respondent fled from the vehicle, he left the driver's side door open. (R. B10). Suspecting that he was involved in the shooting, Officer Kuykendoll then chased respondent for about 30 seconds on foot into the building at 5100 South State and then up to apartment #303. (R. B9-10). While chasing respondent up the stairs, Officer Kuykendoll was 7-10 yards behind him, in uniform, and saying, "Stop, police." (R. B19-20). When they reached the 3rd floor, they stopped inside of the apartment (which was not respondent's residence according to the address he gave during the booking procedures), where Officer Kuykendoll then put respondent in handcuffs and searched him for weapons. (R. B13, 21-22).

Officer Kuykendoll then brought respondent back to the Jeep in the parking lot and informed him that he was suspected of being involved in the shooting. (R. B10). Officer Kuykendoll then asked respondent if he could go through the vehicle and look for weapons. (R. B11, 23). Respondent responded that there were no weapons in the vehicle and consented to a search of the car. (R. B11). Officer Kuykendoll then went into the car and discovered the suspect cocaine in a plastic bag in the console between the two front bucket seats. (R. B23-24, 34-35).

After hearing arguments by the parties, the trial court denied respondent's motion to quash arrest and suppress evidence. The parties then proceeded to a bench trial, where they first stipulated as to the evidence presented on the motion to quash arrest and suppress evidence. (R. B33). Officer Kuykendoll then testified that he found approximately 138 grams of suspected crack cocaine in the vehicle. (R. B12). The suspected crack cocaine in the plastic bag was inventoried under inventory number 029698. (R. B35).

The parties stipulated that if called to testify, Arthur Kruski would testify and be qualified to testify as an expert in forensic chemistry, that he did receive the item inventoried under number 029698, tested the entirety of that and found it to be positive for the presence of cocaine in the amount of 138.6 grams from the nine separate plastic bags. (R. B40-41).

The trial court denied respondent's motion for a directed finding and found him guilty of possession of a controlled substance with intent to deliver. (R. B43, 45). Subsequently, the trial court denied respondent's motion for a new trial. After a hearing, the court sentenced respondent to nine years in the Illinois Department of Corrections. (R. C-8, 11).

REASONS FOR GRANTING THE WRIT

I.

UNDER APPROPRIATE CIRCUMSTANCES, THE PUBLIC SAFETY DOCTRINE, WHICH IS FIRMLY EMBEDDED IN FOURTH AMENDMENT JURISPRUDENCE, SERVES TO EXTEND THE SCOPE AND THE DURATION OF A LAWFUL *TERRY* STOP.

Writ of Certiorari should be granted in the instant matter because the published opinion of the Illinois Appellate Court prematurely halts the scope and duration of lawful *Terry* stops, placing officers and the public in serious jeopardy. Although the Appellate Court correctly found that the initial stop and frisk of respondent was legally justified, it erroneously determined that the officer's conduct in detaining respondent, handcuffing him and removing him from the apartment and returning him to the parking lot went beyond the scope and duration of a *Terry* stop and became an unlawful arrest.[2] *People v. Delaware*, 314 Ill. App. 3d 363, 369-73, 731 N.E.2d 904 (1st Dist. 2000).

The Appellate Court's shortsighted opinion ignores the fact that the officers faced a real and immediate public safety concern. It was reasonable for the officers to believe that respondent left a gun in his car when he abruptly exited the car and ran away from the police.

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[2] The Appellate Court then determined that defendant's consent to search the vehicle was tainted by his illegal arrest and that the contraband found in the car should have been suppressed. 314 Ill. App. 3d at 374-75. However, petitioner maintains that the police officers had the authority to conduct a protective search of the vehicle even in the absence of respondent's consent.

Moreover, when respondent fled, he left the driver's door open. Any passerby, including a child from one of the CHA buildings or one of the men involved in the shooting, could have gained access to a gun in the abandoned vehicle. Hence, a weapon in the vehicle was potentially dangerous to the public and the officers, who had to return to the location of the vehicle in order to reenter their police car or continue their investigation of the shots fired. Therefore, the officers were justified in taking preventive measures to ensure that there were no weapons in the open vehicle.

The *Terry* stop at hand lasted no longer than was necessary to effectuate the purpose of the stop because the reasonable suspicions of the officers could not have been dispelled until they performed a protective search of the vehicle. Therefore, the police had a specific and legitimate basis to continue to detain respondent after the initial patdown revealed no weapon or contraband. Nor was the Fourth Amendment violated when the officers handcuffed respondent and escorted him back to the location of the vehicle because the officers had reasonable suspicion to believe that respondent was potentially dangerous and a flight risk. Such preventive measures were necessary in order to maintain the *status quo* of the situation while the officers continued their investigation.

In making its erroneous determination, the Appellate Court totally ignored the fact that the officers' actions were aimed at addressing a serious public safety concern. As a result, the opinion totally undermines the purpose of the *Terry* stop itself. An analysis of this Court's decisions reveals that public safety concerns are

an integral part of Fourth Amendment jurisprudence.[3] In fact, the doctrine of public safety can be traced back to English common law. Under the common law, "in criminal causes, the public safety supersedes the private." William Blackstone, 4 Commentaries on the Laws of England, 223 (1765-1769). Hence, it is no surprise that the concern for public safety led this Court to carve out a limited exception to the Fourth Amendment probable cause requirement for seizures in the case of *Terry v. Ohio*, 392 U.S. 1 (1968). In doing so, this Court determined that, in order to foster good police work and facilitate crime prevention, it was necessary to provide law enforcement with an intermediate response. As this Court stated:

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow crime to occur or a criminal to escape. On the contrary, *Terry* recognized that it may be good police work to adopt an intermediate response." *Adams v. Williams*, 407 U.S. 143, 145 (1972).

Thus, pursuant to *Terry*, a police officer can briefly stop a suspicious individual in order to ascertain his identity or to maintain the *status quo* while obtaining additional information. In conjunction with the authority to conduct a temporary investigatory stop, *Terry* also allows officers to conduct a protective search for weapons in

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[3] The public safety doctrine has also been part of Fifth Amendment jurisprudence. See, *New York v. Quarles*, 467 U.S. 649 (1984) (overriding concerns of public safety justified the officer's failure to provide *Miranda* warnings before he asked questions devoted to locating the abandoned weapon).

the absence of probable cause to arrest "because it would be unreasonable to deny officers the 'right to neutralize the threat of physical harm' when he possesses an articulable suspicion that an individual is armed and dangerous." *Michigan v. Long*, 463 U.S. 1032, 1035 (1983), *quoting*, *Terry*, 392 U.S. at 24.

Significantly, in the recent case of *Florida v. J.L.*, 120 S.Ct. 1375 (2000), this Court recognized that, under appropriate circumstances, public safety concerns may prevail over an individual's privacy interests. In *J.L.*, this Court held that an anonymous tip that a person is carrying a gun is not, without more, sufficient to justify a police officer's stop and frisk of that person. 120 S.Ct. at 1380. However, the Supreme Court explicitly acknowledged that there may be certain circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. The Court specifically stated:

> "The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without the showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk. Nor do we hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports . . . and schools . . . cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere." 120 S.Ct. at 1380 (citations omitted).

Hence, the *J.L.* opinion permits courts to look at the type of danger alleged in an anonymous tip in order to determine whether a stop and frisk is reasonable even in the absence of a reliability showing. -

Although the bare-bones anonymous tip concerning a man with a gun fell short of providing reasonable suspicion, this Court recognized that:

> "Firearms are dangerous, and extraordinary dangers sometimes justify unusual precautions. Our decisions recognize the serious threat that armed individuals pose to public safety; *Terry*'s rule, which permits protective searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause, responds to this very concern." 120 S.Ct. at 1379.

Thus, the opinion of the Appellate Court in the instant case undermines the very purpose of the *Terry* decision itself because it prematurely halts the scope and the duration of a *lawful* investigatory stop by failing to provide the officers with the opportunity to dispel their reasonable fear that respondent left a gun in his vehicle. Unlike the bare-bones tip in *J.L.*, the officers in the instant case had reasonable suspicion to effectuate a *Terry* stop. They heard shots being fired in the area where respondent abruptly exited his car, leaving the driver's door open, and fled from the police. These events took place at 6:30 in the morning in a residential area. Their concern for public safety was immediate and real.

In fact, this Court explicitly recognized that a gun in a vehicle, which is vulnerable to intrusion by vandals, presents the type of public safety concern that out-

weighs an individual's privacy interests. In *Cady v. Dombrowski*, 413 U.S. 433, 435 (1973), the defendant, who was a Chicago police officer, got into an accident while driving from Illinois to Wisconsin. After arresting the defendant for drunken driving, the police made arrangements to have the vehicle towed to a private garage because the defendant was intoxicated and later became comatose. So, upon the direction of the police, the disabled car was towed to a private garage seven miles away from the police station and was left there unguarded. An officer, who believed that the Chicago Police Department required an officer to carry his service revolver at all times, was concerned that no revolver was found on the defendant. So, early the next day, the officer went to the garage and made a warrantless search of the car and found in the trunk incriminating evidence that led to the defendant's murder conviction.

In *Dombrowski*, which was a probable cause case, the public safety doctrine led this Court to uphold the warrantless search of the trunk because the defendant's car was vulnerable to intrusion. Concerned that the gun could fall into "untrained or malicious hands," this Court stated:

> "Where, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, we hold that the search was not 'unreasonable' within the meaning of the Fourth and Fourteenth Amendments." 413 U.S. at 448.

This Court reasoned that the concern for the safety of the general public, who might be endangered if an intruder removed a revolver from the trunk of the

vehicle, was "immediate and constitutionally reasonable." 413 U.S. 447. Despite the fact that the protective search of respondent's vehicle took place in the context of a *Terry* stop, the situation in the instant case presents an even more serious public safety concern because respondent's vehicle was parked in a lot near a couple of residential buildings and in an area where a shooting had just taken place. There is no question that respondent's vehicle was vulnerable to intrusion by vandals. Unless police officers are given the authority to take immediate action, under similar circumstances, a gun could fall into "untrained or perhaps malicious hands," resulting in tragic, but avoidable, consequences. Indeed, the case at bar is a logical and necessary extension of this Court's decision in *Dombrowski*.

In sum, the Appellate Court's published opinion unduly limits the scope and duration of lawful *Terry* stops placing officers and the public in significant danger. Since similar scenarios are bound to occur throughout the country, Petitioner urges this Honorable Court to take this opportunity to equip an officer with the authority to perform a protective search of a vehicle where the officer has a reasonable belief that a weapon is hidden in that vehicle and that such a weapon poses a danger to investigating officers and the public in general.

II.

ASSUMING THE OFFICERS EXCEEDED THE SCOPE OF A LAWFUL *TERRY* STOP, RESPONDENT'S CONSENT TO SEARCH WAS NOT OBTAINED THROUGH THE EXPLOITATION OF AN UNLAWFUL ARREST WHERE THE OFFICERS WERE NOT REQUIRED TO GIVE RESPONDENT *MIRANDA* WARNINGS AND WHERE THERE WAS NO EVIDENCE THAT THE OFFICERS EMBARKED ON AN INVESTIGATION OF THE CAR FOR THE PURPOSE OF FINDING INCRIMINATING EVIDENCE.

Even assuming the Appellate Court was correct in concluding that the officers' actions exceeded the scope and duration of the *Terry* stop and that respondent was arrested without probable cause, it erred in determining that respondent's consent was tainted by the illegal arrest. See, *Delaware*, 314 Ill. App. 3d at 374-75. In making the erroneous determination that respondent's consent was tainted, the Appellate Court relied heavily on the fact that respondent was not given his *Miranda* rights. See, *Brown v. Illinois*, 422 U.S. 590 (1975). However, in light of the circumstances of the shooting and the possibility that respondent had left a weapon in an open vehicle, the officers were not required to mirandize respondent. See, *New York v. Quarles*, 467 U.S. 649 (1984) (overriding considerations of public safety justified the officers's failure to provide *Miranda* warnings before he asked questions devoted to locating the abandoned weapon). Additionally, there is no evidence in the record that the officers embarked on an investigation of the jeep in the hopes of finding incriminating evidence. Officer Kuykendoll's uncontradicted testimony repeatedly revealed that the purpose of searching the jeep was to locate a weapon that could pose a danger to them and others in the area. Petitioner respectfully re-

quests that this Court exercise its discretion in order to rectify the erroneous precedent established by the Appellate Court of Illinois.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully prays that this Honorable Court grant the instant petition for Writ of Certiorari to review the judgment of the Appellate Court Of Illinois, First District, First Division.

Respectfully submitted,

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APPENDIX A

[Entered June 12, 2000]

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

No. 1-98-2445

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	
v.	)	
ANDRE DELAWARE	)	Honorable THEMIS N. KARNEZIS, Judge Presiding.
Defendant-Appellant.	)	

PRESIDING JUSTICE O'MARA FROSSARD delivered the opinion of the court:

Following a bench trial in the circuit court of Cook County, defendant was found guilty of possession of a controlled substance with intent to deliver and sentenced to a nine-year prison term. On appeal, defendant contends that the trial court erred in denying his motion to quash his arrest and suppress evidence and that the State failed to prove him guilty beyond a reasonable doubt.

BACKGROUND

On May 31, 1997, Chicago Housing Authority (CHA) police officers arrested defendant inside an apartment in the Robert Taylor Homes complex. They subsequent-

ly searched his vehicle parked nearby, recovered narcotics from the vehicle, and, based on this discovery, charged defendant with possession of more than 100 grams of cocaine with intent to deliver. Prior to trial defendant filed a motion to quash his arrest and suppress evidence alleging that the officers had acted without a search or arrest warrant, or without probable cause in the absence of exigent circumstances.

At the hearing on that motion, CHA police officer Jesse Kuykendoll testified that on May 31, 1997, he and his two partners were on routine patrol in the Robert Taylor Homes complex on South State Street in Chicago. About 6:30 a.m., they were in their car at 51st and State when shots rang out from the vicinity of 5135 S. Federal Street. The Officers drove into the parking lot of the building at 5135 S. Federal Street and chased several men inside the building, but lost them on the staircase.

After this unsuccessful pursuit, the officers, who were in uniform, returned to the parking lot to look for weapons or shell casings. As they were doing so, they noticed a white Jeep Cherokee parked in the parking lot of the 5100 S. State Street building. They approached the Jeep and when they arrived within 20 feet of the car, defendant exited the Jeep and ran. The officers chased defendant into the building at 5100 S. State and then into a third-floor apartment of that building. They arrested him inside the apartment. Officer Kuykendoll acknowledged that he had not seen defendant committing any crimes and did not have a warrant for his search or arrest. He testified that he "felt" that defendant was involved in the shooting. Officer Kuykendoll,

with his two partners, brought defendant back to the parking lot.

At the parking lot, Officer Kuykendoll asked defendant if they could search the vehicle and look for weapons. Defendant said there were no weapons in the vehicle and that he had no problem with the officers going through it. Defendant gave his consent to the search and Kuykendoll recovered 138 grams of suspect crack cocaine from the arm rest of the car. Defendant was transported to the station where he gave a home address on the southwest side of Chicago.

Upon further examination by defense counsel, Officer Kuykendoll testified that defendant was not among the group he saw running toward the 5135 S. Federal Street building after the shots were fired and that he first noticed defendant in the Jeep in the parking lot at 5100 S. State Street about five minutes later. As Kuykendoll, who was in uniform, approached defendant, he began to run away. Kuykendoll yelled, "Stop, police," but defendant continued and was arrested inside the third floor apartment. The officers then conducted a protective search of defendant and found no weapons or controlled substances on him. Inside the apartment, the officers handcuffed defendant and led him out of the apartment and out of the apartment building back to the parking lot, where defendant consented to the search of the vehicle resulting in the discovery of the cocaine.

The trial court denied defendant's motion and found the actions of the officers reasonable in light of the totality of the circumstances. The court found as follows:

> "[The] court finds on the date in question the officers were in the vicinity of 51st and State slash Federal. They heard shots fired. They saw people running. They chased them. They did not apprehend them. They returned to the area. They observed Mr. Delaware who was then alighted, leaving the door open and running. We think-I think those are articularly facts at least sufficient to allow the officers to follow along, which they did. I think then what transpired therefore was reasonable in light of the totality of the circumstances. They returned to the vehicle. They received—[c]ould they have gone into the vehicle? I don't have to address that question because they were given consent. So even notwithstanding the fact that they did not have a search warrant, I think their actions were reasonable."

A bench trial ensued and the parties first stipulated to the testimony given by Kuykendoll on the pretrial motion. The officer then testified that he inventoried the bags of suspect cocaine that he recovered from the armrest of the Jeep. He acknowledged a mistake in his police report that indicated the narcotics were recovered from the defendant and not from the armrest of the Jeep. He testified the police report was incorrect.

The State concluded its case with a stipulation as to the results of the scientific testing of the recovered substance. This showed that the nine plastic bags contained 138.6 grams of cocaine. After the trial court denied defendant's motion for a directed finding, the defense rested without presenting any witnesses. The trial court then found defendant guilty of possession of over 100 grams of cocaine with intent to deliver and sentenced him to a nine-year prison term. Defendant appeals.

ANALYSIS

I. Arrest

Defendant challenges the trial court's ruling on his motion to quash arrest and suppress evidence under the fourth and fourteenth amendments to the United States Constitution (U.S. Const., amends. IV, XIV) and under article I, section 6 and section 10, of the Illinois Constitution (Ill. Const. 1970, art. I, §§6, 10). He maintains that his arrest inside the apartment, which was made without a warrant or probable cause, was improper and that this illegal arrest invalidated his subsequent consent to search the vehicle. The State responds that the officers conducted a proper investigative stop of defendant and arrested him, not in the apartment, but in the parking lot after he voluntarily consented to a police search of his vehicle.

Generally, the trial court's ruling on a motion to quash arrest and suppress evidence will not be reversed unless it is manifestly erroneous. *People v. Foskey*, 136 Ill. 2d 66, 76 (1990). The defendant acknowledged that neither the facts nor the credibility of Officer Kuykendoll, the only State witness, is contested. Officer Kuykendoll was the only witness to testify at the pretrial motion in this case. The trial court determined, based on the totality of the circumstances, that the conduct of the officers which led to the discovery of the cocaine was reasonable. We therefore review *de novo* defendant's legal challenge to the trial court's denial of his motion to quash arrest and suppress evidence because defendant challenges neither the trial court's factual findings nor Officer Kuykendoll's version of the events. *People v. Gonzalez*, 184 Ill. 2d 402, 412 (1998).

The fourth amendment to the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend IV; Ill. Const. 1970, art. I, §6. Reasonableness depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 45 L.Ed.2d 607, 614-15, 95 S.Ct. 2574, 2579 (1975). In *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968), the United States Supreme Court held that where a police officer observes unusual conduct, he may stop and detain a person without probable cause to investigate possible criminal activity. 392 U.S. at 30, 20 L.Ed.2d at 911, 88 S.Ct. at 1884-85. To justify a *Terry* stop, an officer "must be able to point to specific and articularly facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." 392 U.S. at 21, 20 L.Ed.2d at 906, 88 S.Ct. at 1880.

Illinois has codified the holding of *Terry* in section 107-14 of the Code of Criminal Procedure of 1963: "[a] peace officer * * * may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing, is about to commit or has committed an offense * * * and may demand the name and address of the person and an explanation of his actions." 725 ILCS 5/107-14 (West 1996); *People v. Flowers*, 179 Ill. 2d 257, 262 (1997). The court in *Terry* set forth the following inquiry for deciding whether an officer's investigative detention is reasonable: (1) "whether the officer's action was justified at its incep-

tion" and (2) "whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 19-20, 20 L.Ed.2d at 905, 88 S.Ct. at 1879. "An objective standard is used in determining whether the facts and circumstances known to the officer at the time of the stop would warrant a person of reasonable caution to believe a stop was necessary to investigate the possibility of criminal activity." *People v. Walters*, 256 Ill. App. 3d 231, 234 (1994). The State bears the burden of showing that a seizure based on reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure. *Florida v. Royer*, 460 U.S. 491, 500, 75 L.Ed.2d 229, 238, 103 S.Ct. 1319, 1326 (1983).

Based on the facts and circumstances known to Officer Kuykendoll, the initial stop and frisk of defendant were legally justified. Several minutes after hearing what were thought to be the sounds of gunshots from the vicinity of 5135 S. Federal, the officers confronted defendant in the parking lot at 5100 S. State. Upon seeing the uniformed officers approach, defendant began running. The totality of the circumstances of the situation known to Officer Kuykendoll at that time, including defendant's sudden unprovoked flight at the approach of the officers in the parking lot, provided sufficient articulable suspicion of criminal activity to warrant an investigatory stop and frisk. *Terry*, 392 U.S. at 21-24, 20 L.Ed.2d at 906-08, 88 S.Ct. at 1879-81 (codified at 725 ILCS 5/107-14 (West 1996)). Under *Terry*, a police officer may stop and detain a person for temporary questioning if the officer reasonably infers from the situation that the person is committing, is about to

commit or has committed a crime. *Terry,* 392 U.S. at 22, 20 L.Ed.2d at 906-07, 88 S.Ct. at 1880. An officer may be justified in "conducting a limited search for weapons, commonly referred to as a 'frisk,' once he had reasonably concluded that the person whom he had legitimately stopped posed a threat to the safety of himself or others." *Gonzalez,* 184 Ill. 2d at 421.

The significance of an individual's unprovoked flight from approaching police officers has recently been addressed in *Illinois v. Wardlow,* 528 U.S. ___, 145 L.Ed.2d 570, 120 S.Ct. 673 (2000). In *Wardlow,* police officers were in an area known for heavy narcotics activity. When the officers approached, defendant fled. One officer stopped defendant and conducted a pat-down search. The police officer found defendant to be in possession of a firearm and arrested him. Defendant challenged the validity of the investigative stop and subsequent arrest. The Illinois Supreme Court found insufficient suspicious circumstances to support an investigatory stop and affirmed a reversal of defendant's conviction. The United Supreme Court reversed, holding that the police officer conducted a valid *Terry* stop. The Court noted that it was not merely defendant's "presence in an area of heavy narcotics trafficking that aroused the officers' suspicion but his unprovoked flight upon noticing the police." *Wardlow,* 528 U.S. ___, 145 L.Ed.2d at 576, 120 S.Ct. at 676. Recognizing that an officer's reasonable suspicion is not based on scientific certainty but on common sense, the Court concluded that the officer was "justified in suspecting that *Wardlow* was involved in criminal activity, and, therefore, in investigating further." *Wardlow,* 528 U.S. ___, 145 L.Ed.2d at 577, 120 S.Ct. at 676.

The Court further acknowledged its previous decisions that found "when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business." *Wardlow*, 528 U.S. ____, 145 L.Ed.2d at 577, 120 S.Ct. at 676, citing *Florida v. Royer*, 460 U.S. 491, 75 L.Ed.2d 229, 103 S.Ct. 1319 (1983). The Court, however, determined that flight from an approaching police officer does not constitute conduct of a citizen merely minding his business, but is the opposite of such conduct, and can raise sufficient suspicion to warrant a *Terry* stop. *Wardlow*, 528 U.S. ____, 145 L.Ed.2d at 577, 120 S.Ct. at 676. The Court cautioned, however, that following this type of *Terry* stop, "[i]f the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way." *Wardlow*, 528 U.S. ___, 145 L.Ed.2d at 577, 120 S.Ct. at 677. While the *Wardlow* Court expanded on the type of conduct that justifies a *Terry* stop and seizure, the Court's analysis remained consistent with the principle that a *Terry* stop must be limited in scope and duration because an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. W*ardlow* referring to *Royer*, 460 U.S. at 500, 75 L.Ed.2d at 238, 103 S.Ct. at 1325.

In this case, the totality of the circumstances, including defendant's unprovoked flight from the Jeep upon seeing the approaching officers justified Officer Kuykendoll's and his partners' initial stop and pat-down search of defendant. The search revealed no weapons or other contraband. The issue, therefore, is whether the officers were justified in continuing to detain defendant after the initial stop and frisk revealed no weapons and

no contraband. The officers' conduct in detaining defendant, handcuffing defendant, removing him from the apartment, removing him from the building, and taking him to the parking lot must be considered in determining whether the investigative seizure went beyond the limited scope and duration of a *Terry* stop and became an unlawful arrest.

The State argues that defendant was not arrested until the discovery of drugs in the Jeep, and before that, the police officers could legally detain defendant as part of their investigation. Defendant contends that the trial court's denial of the motion to suppress and the State's argument overlooks Officer Kuykendoll's testimony that he made a pat-down search of defendant in the apartment, found no drugs or weapons, handcuffed defendant, and placed defendant under arrest in the apartment. Officer Kuykendoll testified that he arrested defendant in the apartment, handcuffed him, and although no weapons or contraband were found on his person, removed him from the apartment and brought him back to the parking lot. Defendant argues that the investigatory *Terry* stop developed into an unlawful arrest unsupported by probable cause after the police handcuffed defendant and took defendant into their custody and control.

An arrest is said to occur where a person's freedom of movement has been restrained by physical force or a show of authority. *People v. Melock*, 149 Ill. 2d 423, 436 (1992). Section 107-2(c) of the Code of Criminal Procedure authorizes an officer to arrest a person without a warrant when the officer "has reasonable grounds to believe that the person is committing or has committed an offense." 725 ILCS 5/107-2(c) (West 1996). The rele-

vant inquiry is whether, under the circumstances, a reasonable person would conclude that he was not free to leave. *Melock*, 149 Ill. 2d at 437. Placing handcuffs on an arrestee has been held to constitute an arrest (*People v. Malltbia*, 273 Ill. App. 3d 622, 628 (1995)) or an action that may convert an investigatory stop into a formal arrest. *People v. Tortorici*, 205 Ill. App. 3d 625, 628 (1990). Although this is not always the case (see, e.g., *People v. Walters*, 256 Ill. App. 3d 231, 237 (1994); *People v. Starks*, 190 Ill. App. 3d 503, 509 (1989) (restraint may be necessary to effectuate detention and foster the safety of the officers)), we find that cases cited by the State fail to support its position that defendant was merely detained under *Terry* in the apartment and not arrested.

In *Walters*, the court found that, during a motor vehicle stop, the police did not exceed that scope of an investigative stop when, following a pat-down search, they handcuffed the occupants of the motor vehicle and placed them in the squad car. According to the court, the officers reasonably detained the suspects to protect the officers' safety. The officers were investigating an armed robbery, stopped a vehicle that contained individuals who matched the description of the suspects within three minutes of the crime, and had a reasonable belief that the suspects were armed. *Walters*, 256 Ill. App. 3d at 238.

The State also cites *People v. Lippert*, 89 Ill. 2d 171 (1982), as authority. In *Lippert*, the police stopped a vehicle containing individuals that matched the description of suspects involved in a recent armed robbery. The police transported the individuals to a hotel in order to see if the victims could identify them. Although

the court found that the police had probable cause to arrest the defendants following the traffic stop, the court also found the transportation of the defendants to the hotel was permissible as part of a *Terry* stop. *Lippert*, 89 Ill. 2d at 181-82. The court reasoned that the police do not exceed the scope of a *Terry* stop when they detain suspects of a crime so witnesses nearby can identify them or for transportation to these witnesses for identification. *Lippert*, 89 Ill. 2d at 182. Thus, both the *Walters* and *Lippert* courts found that the police conducted proper *Terry* stops and detentions because of specific and legitimate reasons for the type of detentions at issue, *i.e.*, to protect the officers' safety from suspects matching the description of offenders involved in a dangerous crime or to obtain a quick identification of the suspects to confirm their involvement in the crime.

Here, by contrast, the police had no specific and legitimate basis to continue to detain defendant. We find, based on this record, that the arrest occurred when the officers handcuffed defendant in the third-floor apartment. The officer testified to that effect (*Tortorici*, 205 Ill. App. 3d at 628), and the show of authority by the three uniformed armed police officers would permit a reasonable person to conclude that once he was handcuffed by the armed police officers he was not free to leave. *Melock*, 149 Ill. 2d at 437.

The next issue is, at the point in time when the police arrested defendant in the apartment, did the police have probable cause to justify placing defendant under arrest. The probable cause requirement of the fourth amendment strikes a balance between the individual's right to privacy and the need for efficient law enforce-

ment. *People v. Moody*, 94 Ill. 2d 1, 7 (1983). Decisions involving the exclusionary rule, based on the fourth amendment and the Illinois Constitution, require that we carefully balance the legitimate aims of law enforcement against the right of our citizens to be free from unreasonable intrusion. *People v. Tisler*, 103 Ill. 2d 226, 242-43 (1984); Ill. Const. 1970, art. I §6. Probable cause exists when police "'have knowledge of facts which would lead a reasonable man to believe that a crime has occurred and that it has been committed by the defendant.'" *People v. Wright*, 111 Ill. 2d 128, 145 (1985), quoting *People v. Eddmonds*, 101 Ill. 2d 44, 60 (1984). While probable cause requires more than mere suspicion, it does not require evidence sufficient to convict the defendant. *Moody*, 94 Ill. 2d at 7.

Here, there was probable cause to arrest defendant if the facts known to Officer Kuykendoll at the time he handcuffed defendant in apartment No. 303 would warrant a man of reasonable caution to believe that a crime had been committed and that defendant committed it. We, therefore, examine the facts known to Officer Kuykendoll when he arrested defendant. At the time of the arrest Kuykendoll did not have an arrest or search warrant. Kuykendoll did not see defendant commit any crimes before arresting him in the apartment. Defendant did not possess any weapons or narcotics. Kuykendoll conceded that he did not receive any information about defendant possessing or shooting a gun.

Kuykendoll admitted he did not see anyone fire a gun at any time before the arrest of defendant. And while he was investigating what he thought were the sounds of gunshots, those sounds were coming from the vicinity

of 5135 S. Federal Street. In the parking lot at 5135 S. Federal, Kuykendoll observed a group of between 3 to 10 black males. Kuykendoll and his partners were not acting on a description, but suspected someone in the group fired the gunshots. Kuykendoll testified that defendant was not a member of this group. Kuykendoll and his partners lost that group after chasing them. Kuykendoll and his partners then confronted defendant in a parking lot at 5100 S. State more then five minutes after they chased and lost the group from the parking lot at 5135 S. Federal. In the parking lot at 5100 S. State, Kuykendoll and his partners did not find any weapons, bullets or shells. It was from the parking lot at 5100 S. State that defendant, upon seeing the uniformed officers approach, ran away. The officers chased defendant into the high-rise building at 5100 S. State. Defendant ran into apartment No. 303. Kuykendoll and his partners entered apartment No. 303 and arrested defendant inside the apartment.

No evidence connected defendant with the building at 5135 S. Federal or with the original group of men chased by the police into that building from the parking lot at 5135 S. Federal. No evidence connected defendant to the gunshots the police believed they heard. Although no evidence connected defendant to the activity under investigation, the officers "felt" that defendant might have been involved in firing the shots they believed they heard. Based on that feeling, they conducted the *Terry* stop and protective search of defendant and found nothing incriminating. The stop and frisk of defendant did not confirm their suspicion. Once the pat-down search of defendant revealed no weapons and no contraband on defendant's person, the police had no

basis to fear for their safety, had nothing to confirm their suspicion and had no specific and lawful reason to handcuff and further detain the defendant.

A *Terry* stop and frisk "may not be used as a general search for evidence of criminal activity." *People v. Creagh*, 214 Ill. App. 3d 744, 748 (1991). After stopping and searching defendant, the officers did not possess facts rising to the level of probable cause. Therefore, they had no lawful authority to continue to detain defendant further or to force him to leave the apartment and accompany them to the parking lot. The lawful purpose for the investigative *Terry* stop was over. *Royer*, 460 U.S. at 500, 75 L.Ed.2d at 238, 103 S.Ct. at 1325. As noted in *Wardlow*, while a *Terry* stop is a minimal intrusion, allowing the officer to briefly investigate further, "If the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way." *Wardlow*, 528 U.S. ___, 145 L.Ed.2d at 577, 120 S.Ct. at 677. Based on the totality of the circumstances known to the officers, the defendant should have been allowed to go on his way.

We, therefore, conclude that Officer Kuykendoll and his partners exceeded the scope of the detention allowed under *Terry* and *Wardlow*. U.S. Const., amend. IV; Ill. Const. 1970, art. I, §6. The officers did not have a warrant for defendant's arrest or probable cause to effectuate it at that time and, therefore, we find that the arrest was illegal.

II. Consent

This determination, however, does not dispose of the issue concerning the admissibility of the contraband

discovered in the Jeep pursuant to defendant's consent. The trial court noted that the search was consensual but this factor alone does not control the admissibility of evidence seized following the search of the Jeep. The defendant contends the illegal arrest tainted defendant's consent to search the Jeep and requires suppression of the evidence. *Royer* addressed application of the tainted fruit doctrine in the Terry context and concluded that, where an officer's detention of a person goes beyond the limited restraint of a *Terry* investigative stop, a subsequent consent to search may be found to be tainted by the illegality. *Royer*, 460 U.S. at 501, 75 L.Ed.2d at 238-39, 103 S.Ct. at 1326, citing *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963). Although a defendant may have voluntarily given the police consent to search, the police may have obtained the consent by the exploitation of an illegal arrest and, in doing so, violated the defendant's fourth amendment rights. *People v. Odom*, 83 Ill. App. 3d 1022 (1980). Thus, consent to search following an illegal detention may be found to have been tainted by the illegality and require suppression of any evidence found pursuant to the illegally obtained consent. *People v. Brownlee*, 186 Ill. 2d 501, 521 (1999).

In *Brownlee*, our supreme court recently considered whether following a lawful traffic stop, the officers' continued detention of a car and its occupants was illegal and tainted the motorist's subsequent consent to search the car. The supreme court concluded that the police officer's detention of the motorist for a few minutes after deciding not to issue any citations subjected the driver and his passenger to a seizure. *Brownlee*, 186 Ill. 2d at 521. The court affirmed the trial court's holding that

the officers continued detention of the defendant after the lawful traffic stop ended was unconstitutional because it was unreasonable. In doing so the court noted that the State waived the right to challenge the trial court's holding because the State made no attempt to show that the officers' continued detention was reasonable, objectively justified or "sufficiently limited in scope or duration" to satisfy the conditions of a *Terry* investigative seizure. *Brownlee*, 186 Ill. 2d at 521. Relying on *Royer*, the court noted that "where an officer's confinement of a person goes beyond the limited restraint of a *Terry* investigative stop, a subsequent consent to search may be found to be tainted by the illegality." *Brownlee*, 186 Ill. 2d at 519, citing *Royer*, 460 U.S. at 501, 75 L.Ed.2d at 238-39, 103 S.Ct. at 1326.

In this case, the trial court never reached the issue of the validity of defendant's consent to search the Jeep because the court found the police conduct reasonable. The State maintains that the defendant's arrest was legal and therefore defendant's consent was not illegally obtained. Having found that defendant was illegally arrested before he gave the consent to search, we address whether defendant's consent was obtained through the exploitation of the unlawful arrest. In making this determination, we utilize the four factors set forth in *Brown v. Illinois*, 422 U.S. 590, 45 L.Ed.2d 416, 95 S.Ct. 2254 (1975). These factors are (1) the giving of *Miranda* warnings; (2) the temporal proximity of the arrest and consent; (3) the presence of any intervening circumstances; and (4) the purpose and flagrancy of the official misconduct. *Brown*, 422 U.S. at 603-04, 45 L.Ed.2d at 427, 95 S.Ct. at 2261-62.

No extensive analysis is required here where the record shows that defendant was not advised of his *Miranda* rights before giving the officers consent to search the Jeep within minutes of his arrest. There were also no intervening circumstances between the illegal arrest and this consent, which were close in time. Moreover, as noted in *Brown*, when police embark on an investigation in the hope that some incriminating evidence might be found the illegality has a quality of purposefulness. *Brown*, 422 U.S. at 605, 45 L.Ed.2d at 428, 95 S.Ct. at 2262. Here, the conduct of the police in detaining defendant, handcuffing defendant, removing him from the apartment, removing him from the building, bringing him to the parking lot, and questioning him in the parking lot has the quality of purposefulness identified in *Brown* as a factor to be considered in determining whether consent was obtained by exploitation of an illegal arrest. *Brown*, 422 U.S. at 604, 45 L.Ed.2d at 427, 95 S.Ct. at 2262. In light of the foregoing, we conclude that defendant's consent to search was tainted by his illegal arrest and that the contraband found in the car should have been suppressed. *People v. Harris*, 159 Ill. App. 3d 592, 596 (1987).

CONCLUSION

Under *Terry* and its progeny, the State has the burden of showing that an investigative detention based on reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of a *Terry* investigative seizure. *Royer*, 460 U.S. at 500, 75 L.Ed.2d at 238, 103 S.Ct. at 1326. Based on this record,

the State has failed to show that the officer's detention was sufficiently limited in scope and duration to satisfy the conditions of a *Terry* investigative seizure. We find the initial lawful investigatory *Terry* stop developed into an unlawful arrest unsupported by probable cause. The subsequent consent to search was tainted by the illegality of the arrest and the evidence found pursuant to the illegally obtained consent is suppressed.

Therefore, we hold that the trial court erred in denying defendant's motion to quash his arrest and suppress evidence. For the foregoing reasons, the arrest of defendant and search of his vehicle were constitutionally infirm. U.S. Const., amend. IV, Ill. Const. 1970, art. I, section 6. The controlled substance that was the basis for defendant's conviction should have been suppressed as the product of the unconstitutional seizure of his person. *Wong Sun*, 371 U.S. at 488, 9 L.Ed.2d at 455, 83 S.Ct. at 417. Rather than remanding, we reversed defendant's conviction outright because the State will not be able to prevail without the recovered evidence. *People v. Evans*, 259 Ill. App. 3d 650, 659 (1994). Consequently, there is no double jeopardy problem to consider. *People v. Villareal*, 2301 Ill. App. 3d 223 (1990). The judgment of the circuit court is reversed.

Reversed.

RAKOWSKI and GALLAGHER, JJ., concur.

APPENDIX B

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	
v.	)	1-98-2445
ANDRE DELAWARE,	)	
Defendant-Appellant.	)	

ORDER

This cause coming to be heard on Plaintiff-Appellee's Petition for Rehearing; the Court being fully advised in the premises:

IT IS HEREBY ORDERED that the Petition for rehearing is denied.

ORDER ENTERED

Jul 12 2000

Appellate Court, First District

APPENDIX C

(Letterhead of)

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
Supreme Court Building
Springfield, Illinois 62701
(217) 782-2035

October 4, 2000

Ms. Veronica Calderon
Assistant State's Attorney
309 Richard J. Daley Center
Chicago, IL 60602

No. 90071 — People State of Illinois, petitioner, v. Andre Delaware, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for Leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 26, 2000.

SUPREME COURT, U.S.
FILED
APR 2 2001
OFFICE OF THE CLERK

No. 00-1142

In The

Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

ANDRE DELAWARE,

Respondent.

On Petition For Writ Of Certiorari
To The Appellate Court Of Illinois, First District

BRIEF IN OPPOSITION

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STATEMENT OF FACTS

On May 31, 1997, at 6:30 a.m. while on routine patrol Chicago Housing Authority ("CHA") police officer, Jesse Kuykendoll, drove with two partners in a CHA police car southbound down State Street in Chicago, Illinois. While driving southbound down State Street, Kuykendoll stopped his car at the red light on the corner of State and 51st streets. (R. B4-5; B14; B16).

While stopped at the red light, Kuykendoll thought that he heard gun shots being fired from a building at 5135 S. Federal Street. Kuykendoll then drove into the parking lot at 5135 S. Federal to investigate the suspected gun shots. (R. B6-7; B14).

In the parking lot at 5135 S. Federal, Kuykendoll observed a group of between three to ten males. Defendant Andre Delaware was not a member of this group. In fact, Delaware was never in or near the building located at 5135 S. Federal Street.

Officer Kuykendoll suspected someone in the group of three to ten males fired the gun shots; therefore, Kuykendoll and his partners approached the group to investigate. However, every person in this group ran away and into the building at 5135 S. Federal Street.

The three officers chased after and followed the fleeing group into the building at 5135 S. Federal. While in the staircase in the building, the three officers lost every single fleeing man in the group. Thus, Kuykendoll and his two partners failed to catch anyone from the group suspected of firing the gun shots. After losing the entire

group in the staircase, the officers then exited from the building at 5135 S. Federal. (R. B7; B16-18).

Next, the three officers went to a nearby but different parking lot at 5100 S. State Street. The officers arrived in this different parking lot five minutes after losing the entire group of suspected shooters in the staircase of the building at 5135 S. Federal. (R. B6; B18).

Five minutes after losing the entire group of men suspected of firing the shots, the officers continued to search for weapons, bullets and shell casings in the different parking lot at 5100 S. State Street. The officers did not find any guns or bullets or shell casings in the parking lot at 5100 S. State Street.

While searching the ground of the State Street parking lot, Kuykendoll saw Defendant Delaware depart from a Jeep parked in the lot at 5100 S. State Street. Kuykendoll was 20 yards away from Delaware at this time. (R. B8-9; B19).

Kuykendoll approached to ask Delaware about the gun shots previously fired in the other parking lot at 5135 S. Federal Street. Delaware, however, ran away from Kuykendoll and left open the front door of the Jeep. Delaware ran into the building at 5100 S. State Street.

Kuykendoll and his two partners chased after and followed Delaware into the building at 5100 S. State Street. Delaware ran into apartment #303. Kuykendoll and both of his partners all entered into and seized Delaware inside of the apartment.

Kuykendoll testified that he placed Delaware under arrest in the apartment. (R. B5). Kuykendoll handcuffed

Delaware in the apartment. Kuykendoll placed Delaware under his control and custody in the apartment. Kuykendoll searched Delaware in the apartment. Kuykendoll found no weapons nor narcotics on Delaware. All three officers were armed while placing Delaware under arrest in the apartment. Kuykendoll said that he placed Delaware under arrest inside of the apartment. (R. B20-22).

Kuykendoll did not have a warrant for Delaware. Kuykendoll did not see Delaware commit any crime before arresting him in the apartment. (R. B5). Kuykendoll did not receive any information about Delaware possessing or shooting a gun. Kuykendoll did not see anyone fire a gun before he arrested Delaware. (R. B14-16). Kuykendoll said Delaware did not possess nor drop any weapons or narcotics during the chase into apartment #303 in the building at 5100 S. State Street. (R. B5; B9).

After placing Delaware under arrest in the apartment, the three armed officers transported the handcuffed Delaware to the Jeep in the parking lot. Upon arriving at the Jeep, Kuykendoll told Delaware that he felt Delaware was involved with the earlier gun shots. Kuykendoll then asked for permission to search the Jeep. (R. B11).

Delaware told Kuykendoll that he did not have any weapons in the Jeep. Delaware also said that he did not have a problem with Kuykendoll looking in the Jeep. (R. B11-12; B23).

Then, Kuykendoll searched throughout the Jeep. Kuykendoll did not find a gun in the Jeep. Kuykendoll

did not find bullets or shell casings in the Jeep. Kuykendoll recovered a plastic bag containing 138 grams of cocaine from under the Jeep's arm rest. The police never found a gun at any time during this incident. (R. B6; B12; B24).

Delaware filed a Motion to Quash and Suppress. At the hearing defense counsel argued that Kuykendoll arrested Delaware in the apartment without probable cause and the three armed officers improperly transported the handcuffed Delaware to the Jeep in the parking lot. Defense counsel argued that the consent was tainted by the unlawful arrest in the apartment without probable cause. (R. B27-28).

The trial court found that the police acted reasonably and found that Delaware's consent was valid. Accordingly, the trial court denied the Motion. (B30-31).

REASONS FOR DENYING THE WRIT

This Court should deny this petition for lack of jurisdiction because Petitioner did not make these "public safety" arguments in the trial court or in a timely manner in the Illinois courts of review. In fact, Petitioner has presented different legal theories at each different stage of the appellate process.

Furthermore, this Court should deny this petition because Petitioner misrepresents and omits decisive facts. These facts undermine Petitioner's arguments. First, Petitioner says the seizure of Defendant in the apartment and

subsequent transportation of him to the Jeep were conducted during an extended *Terry* stop instead of during an arrest. However, Petitioner ignores State witness Kuykendoll's testimony about placing Defendant under arrest in the apartment. Second, even though the police never found a gun in this case, Petitioner claims Kuykendoll reasonably suspected a gun was in the Jeep. The record, however, fails to show that Kuykendoll had a reasonable articulable suspicion that a gun was in the Jeep. Third, Petitioner glosses over the quality of Kuykendoll's testimony. Kuykendoll testified that he recovered a plastic bag containing cocaine from under an armrest in the Jeep. In his police report, however, Kuykendoll recorded that Delaware fled from the Jeep with a plastic bag of cocaine in his possession during the chase to the apartment.

Finally, this Court should deny this petition because Petitioner fails to present any compelling reasons for granting this petition. Petitioner's legal authority for the "public safety" arguments is unavailing.

Therefore, the Illinois appellate court's holding in this case is proper in all respects and does not call for a review by this Court.

I. THIS HONORABLE COURT LACKS JURISDICTION BECAUSE PETITIONER FAILED TO PROPERLY RAISE THESE ARGUMENTS IN THE ILLINOIS TRIAL AND APPELLATE COURTS

Petitioner primarily argues that the seizure of Defendant without a warrant in the apartment and subsequent transportation of Defendant to the Jeep in the parking lot

were properly conducted during an extended *Terry* stop, instead of during an arrest requiring probable cause.

Petitioner claims the "public safety" exception to the warrant requirement authorized the police to seize Defendant in the apartment and then transport him to the Jeep in the parking lot without probable cause during an extended *Terry* stop. As legal authority for this dubious argument, Petitioner requests this Court to extend *United States v. Dombrowski*, 413 U.S. 433, 435 (1973). (*See* Petition for Writ at pp. 6-12).

Petitioner's second argument is that under *New York v. Quarles*, 467 U.S. 649 (1984), the police did not need to Mirandize Delaware after his unlawful arrest because of concern for the public safety. Also, in this argument Petitioner says the Illinois appellate court misapplied the facts about this consent being tainted by the unlawful arrest and the appellate court misapplied the law of *Brown v. Illinois*, 422 U.S. 590 (1975).[1] (*See* Petition for Writ at p. 13).

Petitioner, however, did not make these "public safety" arguments in the trial court. In the trial court neither party introduced evidence directly pertaining to "public safety." In the trial court neither party argued, for or against, expanding the "public safety doctrine" for application in this case. Thus, the trial judge never

---

[1] *See* Rule 10 of the Supreme Court of the United States: "A petition for certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

received the opportunity to decide whether the "public safety" exception applied to this case.

Likewise, Petitioner failed to make these arguments in a timely manner in the Illinois appellate court. In their "Brief and Argument," Petitioner did not request the appellate court to expand the "public safety" exception for application in this case.

The Illinois Appellate Court issued a nineteen page opinion in which a three person panel unanimously suppressed the seized cocaine and reversed this case outright without remand. The appellate court's well-reasoned opinion, from caption to conclusion, does not contain even a single mention of the arguments now raised by Petitioner.

After the appellate court issued its opinion, then Petitioner filed a petition for rehearing. In the petition for a rehearing, for the first time, Petitioner mentioned a "public safety" argument in one short sentence. (*See* last sentence on p. 8 of Petition for Rehearing). Petitioner never raised the *Quarles* argument at any time in the appellate or trial court.

The Illinois appellate court properly denied the petition for rehearing without addressing or even mentioning Petitioner's one sentence "public safety" argument. (*See* Petition for Writ at p. App. 20).

Next, Petitioner requested leave to appeal to the Supreme Court of Illinois. In this request Petitioner relied on *United States v. Buie*, 494 U.S. 325 (1990), to argue that the search of the Jeep was a reasonable "protective sweep." Petitioner again mentioned the "public safety"

theory in only one short sentence. Petitioner never asked the Supreme Court of Illinois to expand the "public safety doctrine" for application in this case. Petitioner never asked the Supreme Court of Illinois to extend the holding or rationale in *United States v. Dombrowski*, 413 U.S. 433, 435 (1973). The Supreme Court of Illinois properly exercised its discretion and refused to hear this case. (*See* Petition for Writ at p. App. 21).

Thus, Petitioner presented different legal theories at the different stages of the appellate process. In the trial court no evidence was introduced nor arguments made about the "public safety exception" to the warrant requirement. Petitioner's "public safety" theory has never been briefed by the parties at any time in the Illinois courts of review. Neither the trial nor appellate court had an adequate opportunity to decide the arguments now raised by Petitioner.

In *People v. Nau*, 167 Ill.App.3d 338, 521 N.E.2d 177 (2nd Dist. 1988), the trial court granted the motion to suppress because the State did not show that defendant knowingly waived his rights before confessing. The State filed an interlocutory appeal. As with Petitioner in this case, the State in *Nau* raised the "public safety exception" for the first time in the appellate court.

The Illinois appellate court in *Nau* held that under Illinois Law the State waived the "public safety exception" by not raising this theory in the trial court:

> The State presents for our consideration an alternative argument based upon the public safety exception to the Miranda rule which was

> created in New York v. Quarles [citation omitted]. Defendant correctly points out that the State did not present this issue to the trial court for consideration. Questions not raised in the trial court are generally deemed waived and may not be raised for the first time on appeal. [citation omitted]. As the Holloway court observed, a fundamental reason for the waiver rule is that the failure to raise an issue at the trial level will often cause the opposing party to forego presentation of available pertinent rebuttal evidence which could be relevant to disposition of the question. [citation omitted]. Had the State timely raised the issue of the public safety exception, defendant might have been able to produce evidence to show that it did not apply to this situation. Obviously, defendant cannot now do so. Consequently, we find that the State has waived its right to assert its alternative argument.

Id. at 349-50, 183.

See also People v. Turnage, 162 Ill.2d 299, 312-13, 642 N.E.2d 1235, 1241 (1994) (Supreme Court of Illinois refused to consider State's different theory for first time on appeal because no evidence on this theory presented in trial court); *People v. Holloway*, 86 Ill.2d 78, 426 N.E.2d 871 (1981) (Supreme Court of Illinois holds that State can not raise different theory for first time on appeal); *People v. McAdrian*, 52 Ill.2d 250, 287 N.E.2d 688 (1972) (same).

Therefore, under Illinois Law Petitioner is prohibited from raising the "public safety" theory for the first time on appeal to this Court. Petitioner's arguments were not considered by the trial court or by the Illinois courts of review.

Furthermore, this Court's own precedents hold that this Court lacks jurisdiction to decide issues not properly preserved or raised by a Petitioner in the State courts below. *See Sochor v. Florida*, 504 U.S. 527, 112 S.Ct. 2114 (1992) (United States Supreme Court does not have jurisdiction to hear issue not properly preserved for review by State appellate courts); *Fullerton v. Texas*, 196 U.S. 192, 25 S.Ct. 221 (1904) (United States Supreme Court lacked jurisdiction to decide issue raised for first time during petition for rehearing in state appellate court); *Jacobi v. Alabama*, 187 U.S. 133, 23 S.Ct. 48 (1902) (United States Supreme Court lacked jurisdiction to decide issue not raised in trial court and raised for first time in request for review to state Supreme Court); *Spies v. Illinois*, 123 U.S. 131, 8 S.Ct. 22 (1887) (United States Supreme Court lacked jurisdiction to decide issue not timely raised in or decided by state courts).

Therefore, Defendant respectfully requests this Court to deny this Petition because of the lack of jurisdiction.

II. PETITIONER MISREPRESENTS AND OMITS DECISIVE FACTS

First, Petitioner claims the seizure of Defendant in the apartment and subsequent transportation of him to the Jeep in the parking lot were conducted during an extended *Terry* stop instead of during an arrest.

However, Petitioner blindly ignores State witness Kuykendoll's testimony about placing Defendant under arrest in the apartment. Kuykendoll was the only witness to testify during this hearing. No witness said Delaware

was only subjected to a *Terry* stop in the apartment and parking lot.

Kuykendoll unequivocally testified that he placed Delaware under arrest in the apartment:

> Q [By defense counsel] Directing your attention to May 31, 1997, approximately 6:30 a.m. did you have an occasion to arrest my client defendant Andre Delaware about 6:30 a.m.?
>
> A [By Officer Kuykendoll] That is true, sir.
>
> Q And you in fact arrested him as he was entering his apartment Number 303, 5100 South State Street?
>
> A That's correct.
>
> Q And that's in Chicago, Cook County, Illinois?
>
> A Yes, sir.
>
> Q And prior to your arresting him at that time and at that place you had not seen him in the process of committing any crimes, is that correct?
>
> A That's correct.
>
> Q And you didn't have any arrest warrant or search warrant nor were you aware of any such arrest or search warrant authorizing the arrest and search of my client at that time and date.
>
> A No, we didn't have a search warrant or an arrest warrant. (R. at B5).
>
> . . .

Q And when you got up to this apartment it was inside the apartment that you actually physically placed him under your control and custody, correct?

A That's correct sir.

Q And in fact you then searched him for your own protection to see if he had any weapon on him, right?

A That's correct.

Q And you didn't find any weapon on him, did you?

A No, sir, we didn't find a weapon.

Q And during that search you didn't find any controlled substances on him, did you?

A No, sir.

Q In fact you handcuffed him at that time, right?

A Yes, we did.

Q And you took him from the apartment back down to the parking lot where that white car was, right?

A That's correct. (R. at B22-23).

This Illinois appellate court carefully and correctly found that Officer Kuykendoll exceeded a *Terry* stop and placed Defendant under arrest in the apartment:

> The officers' conduct in detaining defendant, handcuffing defendant, removing him from the apartment, removing him from the building, and taking him to the parking lot must be considered in determining whether the investigative seizure went beyond the limited scope and

> duration of a Terry stop and became an unlawful arrest. The State argues that defendant was not arrested until the discovery of drugs in the Jeep, and before that, the police officers could legally detain defendant as part of their investigation. Defendant contends that the trial court's denial of the motion to suppress and the State's argument overlooks Officer Kuykendoll's testimony that he made a pat-down search of defendant in the apartment, found no drugs or weapons, handcuffed defendant, and placed defendant under arrest in the apartment. Officer Kuykendoll testified that he arrested defendant in the apartment, handcuffed him, and although no weapons or contraband were found on his person, removed him from the apartment and brought him back to the parking lot. Defendant argues that the investigatory Terry stop developed into an unlawful arrest unsupported by probable cause after the police handcuffed defendant and took defendant into their custody and control . . . We find, based on this record, that the arrest occurred when the officers handcuffed defendant in the third-floor apartment. The officer testified to that effect (Tortorici, 205 Ill. App. 3d at 628), and the show of authority by the three uniformed armed police officers would permit a reasonable person to conclude that once he was handcuffed by the armed police officers he was not free to leave.

Petition for Writ at pp. App. 11-12.

Therefore, Petitioner misrepresents the fact about Kuykendoll placing Defendant under arrest in the apartment. This decisive fact invalidates Petitioner's argument.

Second, even though the police never found a gun in this case, Petitioner claims Kuykendoll reasonably suspected a gun was in the Jeep. The record, however, fails to show that Kuykendoll had a reasonable articulable suspicion that a gun was in the Jeep. In fact, the three officers never recovered a gun during this incident.

This Illinois appellate court noted Kuykendoll "felt" that Defendant was somehow involved with the gun shots. However, Kuykendoll's "feeling" did not constitute a reasonable articulable suspicion that a gun was in the Jeep. This appellate court paid close attention to Kuykendoll's failure to point to any objective facts or evidence suggesting that a gun might be in the Jeep:

> Kuykendoll did not see defendant commit any crimes before arresting him in the apartment. Defendant did not possess any weapons or narcotics. Kuykendoll conceded that he did not receive any information about defendant possessing or shooting a gun. Kuykendoll admitted he did not see anyone fire a gun at any time before the arrest of defendant. And while he was investigating what he thought were the sounds of gunshots, those sounds were coming from the vicinity of 5135 S. Federal Street. In the parking lot at 5135 S. Federal, Kuykendoll observed a group of between 3 to 10 black males. Kuykendoll and his partners were not acting on a description, but suspected someone in the group fired the gunshots. Kuykendoll testified that defendant was not a member of this group. Kuykendoll and his partners lost that group after chasing them. Kuykendoll and his partners then confronted defendant in a

> parking lot at 5100 S. State more then five minutes after they chased and lost the group from the parking lot at 5135 S. Federal . . . No evidence connected defendant with the building at 5135 S. Federal or with the original group of men chased by the police into that building from the parking lot at 5135 S. Federal. No evidence connected defendant to the gunshots the police believed they heard. Although no evidence connected defendant to the activity under investigation, the officers "felt" that defendant might have been involved in firing the shots they believed they heard. Based on that feeling, they conducted the Terry stop and protective search of defendant and found nothing incriminating. The stop and frisk of defendant did not confirm their suspicion. Once the pat-down search of defendant revealed no weapons and no contraband on defendant's person, the police had no basis to fear for their safety, had nothing to confirm their suspicion and had no specific and lawful reason to handcuff and further detain the defendant.

Petition for Writ at pp. App. 13-15.

Therefore, this record fails to establish a reasonable articulable suspicion for Kuykendoll's continued detention and transportation of Defendant in handcuffs back to the Jeep in the parking lot. *See People v. Brownlee*, 186 Ill.2d 501, 521 (1999).

Third, Petitioner simply glosses over the quality of Kuykendoll's testimony. Kuykendoll testified that he looked under an armrest and recovered a plastic bag containing cocaine from within the Jeep. (R. B6; B12; B24). In his police report, however, Kuykendoll recorded that

Delaware fled from the Jeep with a large plastic bag of cocaine in his possession during the chase to the apartment. (R. B25-26; B36).

In their opinion this Illinois appellate court expressly noted Kuykendoll's "mistake." (*See* Petition for Writ at p. App. 4).

Therefore, the above decisive factors undermine Petitioner's arguments. The Illinois appellate court's holding is proper in all respects and does not call for a review by this Court.

III. PETITIONER FAILS TO DEMONSTRATE ANY COMPELLING REASON FOR THIS COURT TO GRANT THIS PETITION

Petitioner fails to demonstrate any compelling reasons for this Court to grant this petition for writ of certiorari. In actuality, Petitioner is simply unhappy with the opinion of the Illinois appellate court. Nevertheless, the appellate court's holding is proper in all respects and does not call for a review by this Court.

Petitioner fails to demonstrate that the holding of this Illinois appellate court conflicts with the decision of another state court of last resort. Also, Petitioner fails to demonstrate that this Illinois appellate court holding conflicts with the decision of a United States court of appeals.

Furthermore, Petitioner fails to demonstrate that this Illinois appellate court holding conflicts with any decisions of this Court. In fact, the holding of this Illinois appellate court is in accordance with *Terry v. Ohio*, 392

U.S. 1, 19-20, 88 S.Ct. 1868, 1879 (1968) and *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325-26 (1983).

Petitioner's request to extend *United States v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523 (1973), is misplaced and is not a compelling reason for granting this petition. *Dombrowski* is not on point. *Dombrowski* involved the reasonableness of a standard searching procedure by a rural police department while impounding the cars of off duty police officers. In contrast, this case does not involve a standard searching practice by a rural police department. In this case, Defendant is not a police officer who is routinely armed with a gun. In fact, in this case Defendant never had a gun. Also, Petitioner's sparse legal authority for extending *Dombrowski* is unavailing.

Therefore, Petitioner fails to demonstrate any compelling reasons for this Honorable Court to grant this petition. (*See* Rule 10 of the Supreme Court of the United States). The Illinois appellate court's holding is proper in all respects and does not call for review by this Court.

CONCLUSION

WHEREFORE, for all of the reasons sets forth above, Defendant, Andre Delaware, respectfully requests this Honorable Court to deny this petition.

Respectfully submitted,

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No. 00-1142

Supreme Court, U.S.
FILED
APR 17 2001
CLERK

In the

Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

ANDRE DELAWARE,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

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ARGUMENT

In its petition, the State of Illinois clearly established that the Appellate Court's opinion unduly limits the scope and duration of lawful *Terry* stops, placing police officers and the public in serious jeopardy. The record before this Court reveals that it was reasonable for the officers to suspect that respondent was involved in a shooting and that respondent left a gun in his car when he abruptly exited the car and ran away from the police. At the suppression hearing, Officer Kuykendoll repeatedly testified that he wanted to search the Jeep for weapons. (R. B10, 11, 23) It was also clear from the record that a potential weapon in the Jeep posed a danger to the officers and the public because respondent left the driver's door open as he fled from the police. (R. B10) Therefore, Petitioner is at a loss to understand how respondent can seriously claim that in the trial court neither party introduced evidence directly pertaining to "public safety," and as result, this Court lacks jurisdiction to review the public safety argument advanced by Petitioner. (See, Resp.'s Br. In Opp. at 5-10) Common sense dictates that an abandoned gun in an open car poses a danger to the public and that the Appellate court's opinion strips the police of the authority to confront that danger. As such, this Court should reject respondent's jurisdictional argument.

Respondent also attempts to escape the fact that the officers faced a real and immediate public safety concern by misrepresenting the testimony of Officer Kuykendoll. Respondent claims that the parking lot where the officers saw and chased the group suspected of firing shots was not the same parking lot where the officers went to search for weapons and encountered re-

spondent. In his Statement of Facts, respondent specifically stated:

> **In the parking lot at 5135 S. Federal**, Kuykendoll observed a group of between three to ten males. Defendant Andre Delaware was not a member of this group. In fact, Delaware was never in or near the building located at 5135 S. Federal Street.
>
> Officer Kuykendoll suspected someone in the group of three to ten males fired the gun shots; therefore, Kuykendoll and his partners approached the group to investigate. However, every person in this group ran away and into the building at 5135 S. Federal Street.
>
> **The three officers chased after and followed the fleeing group into the building at 5135 S. Federal.** While in the staircase in the building, the three officers lost every single fleeing man in the group. Thus, Kuykendoll and his two partners failed to catch anyone from the group suspected firing the gun shots. After losing the entire group in the staircase, the officers then exited from the building at 5135 S. Federal. (R. B7; B16-18)
>
> **Next, the three officers went to a nearby but different parking lot at 5100 S. State.** The officers arrived in this different parking lot five minutes after losing the entire group of suspected shooters in the staircase of the building at 5135 S. Federal. (R. B6; B18)
>
> **Five minutes after losing the entire group of men suspected of firing shots, the officers continued to search for weapons, bullets and shell casings in the different parking lot at 5100 S. State Street.** The officers did not find any guns or bullets or shell

> casings in the parking lot at 5100 S. State Street.
>
> While searching the ground of the State Street parking lot, Kuykendoll saw Defendant Delaware depart from a Jeep parked in the lot at 5100 S. State Street. Kuykendoll was 20 yards away from Delaware at this time. (R. B8-9; B19) (emphasis added)

Respondent's assertion that there were two parking lots is directly contradicted by the record.[1] The following ex-

---

[1] Significantly, on direct appeal respondent set forth yet another version of the facts:

> "After losing the group, Kuykendoll and his partners then exited from the building and returned to their car in the parking lot. (B7; B16-18) Next Kuykendoll drove his police car and his two partners out of the parking lot at 5135 S. Federal.
>
> After leaving 5135 S. Federal, Kuykendoll and his partners then drove to a different parking lot located at 5100 S. State Street. Kuykendoll drove to the different parking lot at 5100 S. State to somehow continue investigating the possible gun shots fired earlier at 5135 S. Federal.
>
> Five (5) minutes after losing the group suspected of firing the gun shots, Kuykendoll and his partners arrived in the different parking lot at 5100 S. State (B8; B18)" (Deft.'s Br. at 2) (emphasis added)

There is absolutely no testimony that the officers returned to their car, re-entered it and then drove to a non-existent parking lot. Unfortunately, the Illinois Appellate Court relied on respondent's version of the facts and based its analysis of the issue on the false assertion that there were two parking lots. Petitioner filed a petition for rehearing requesting the Appellate Court to re-examine the propriety of the officers' conduct within the context of the actually testimony presented at the suppression hearing. (*See* Petition for Rehearing) Unfortunately, the Appellate Court denied the petition.

cerpts of Officer Kuykendoll's testimony totally exposes respondent's version of the facts as a self-serving manipulation of the record:

> Q [Prosecutor]: And when you got to that area can you tell Judge Karnezis what is that you saw?
>
> A: **We pulled up into the parking lot**. There were shots still being fired. A foot chase ensued. We chased several male blacks into 5135 Federal building where we lost them in the staircase.
>
> **Q: And as you ran chasing these gentlemen did you notice any vehicles in the area?**
>
> **A: Well we did notice a Jeep Cherokee.**
>
> Q: And you didn't stop at the Jeep Cherokee at that point, did you?
>
> A: No, sir.
>
> Q: Were you able to catch the gentlemen that were on foot and running from you?
>
> A: No sir.
>
> Q: After you were able—not able to catch up with him did you go anywhere?
>
> A: Yes, sir.
>
> Q: Where did you go?
>
> **A: We came back to the parking lot because we were looking to see if they had dropped any weapons or shell casings. We observed the defendant jump out of his vehicle. It was a white Jeep Cherokee.** (R. B7-8) (emphasis added)
>
> * * *
>
> **Q [defense counsel]: Then you and your partner returned back over to 5100 South State, right?**

A: That's correct, to the parking lot area.

Q: And searched for weapons?

A: That's correct

Q: This was what? **About five minutes after you had begun chasing these individuals to the Federal address?**

A: That's sounds about right, sir.

Q: And when you got back over to 5100 South State you didn't find any weapons over there, did you?

A: No, we didn't.

Q: Didn't find any cartridges over there, did you?

A: No we didn't.

Q: You saw a white Cherokee parked in the parking lot over there, right?

A: That's correct.

Q: And the area where you saw that in fact was where people who live in those buildings can park their cars. It's their parking lot, is that correct?

A: Yes.

Q: And you had not seen—Had you seen that car actually drive up and park there or was it stopped?

A: It was already there when we came in.

Q: It's your testimony that you saw my client and coming out of that car, is that correct?

A: That's correct.

Q: Now that is at 6:30 in the morning and there had been a lot of gunshots out there, right?

A: Yes, sir. (R. B18-19) (emphasis added)

Hence, the above-quoted excerpts establish, beyond any doubt, that the parking lot where the officers began to chase the group of men suspected of firing gun shots and the parking lot where the officers encountered respondent and the Jeep were one and the same. Indeed, it makes no sense that the officers would go to a different parking lot to search for weapons and shell casings.

Moreover, an examination of the trial court's findings also refutes the existence of a second parking lot. In denying defendant's motion to quash arrest and suppress evidence, the trial court made the following findings of fact:

> "[The] Court finds on the date in question the officers were in the vicinity of 51st and State slash Federal. They heard shots fired. They saw people running. They chased them. They did not apprehend them. They returned to the area. They observed Mr. Delaware who was then alighted, leaving the door open and running." (R. B30-31)

The record clearly proves that the officers encountered respondent in the parking lot where the shots were fired and the chase of the group of suspects began.[2]

---

[2] Another factor militating against the defendant's version of the facts and this Court's finding is that State Street is the dividing line between east and west address designations in the City of Chicago and Federal Avenue is designated as being located at 56 West. Thus, Federal Avenue is less than one full block west of State Street. Further, the building to which defendant fled has the address of 5100 South State, thereby placing it on the west side of State Street, as even-numbered addresses on Chicago's north-south streets are located on the

(continued...)

Respondent also argues that Petitioner's argument is invalidated by the fact that Officer Kuykendoll testified that he placed respondent under arrest in the apartment. (Resp.'s Br In Opp. at 10-12) However, in *Scott v. United States*, 436 U.S. 128, 137 (1978), this Court stressed the fact that "almost without exception in evaluating alleged violations of the Fourth Amendment the Court has undertaken an objective assessment of an officer's actions in light of the facts and circumstances known to him." Hence, this Court held that "the fact the officer does not have the state of mind which is hypothecated by reasons which provide the legal justification for the officer's actions does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Scott*, 436 U.S. at 138. This Court further acknowledged that motives are not always to be disregarded in a suppression inquiry, but stated that the focus on intent becomes relevant **only after** a court determines that the Constitution was in

---

[2] (...continued)
east side of the street while odd-numbered addresses are located on the street's east-side. Besides, there are no other north-south streets between State Street and Federal Avenue in the area in question. This Court may take judicial notice of these facts, for they are common knowledge. *See Carroll v. United States*, 267 U.S. 132 (1925). Thus, as the officer testified there is but one parking lot into which he and his partners entered, and it is reasonable to infer that this parking lot is common to those housing authority buildings which have both State Street and Federal Avenue addresses in the vicinity of 51st and State Street, including the 5135 South Federal building into which the group of men and the 5100 South State Street building into which defendant fled when he saw the officers walk toward him upon their return to the parking lot.

fact violated. As thoroughly discussed in the Petition for Writ of Certiorari, the police officers had a legitimate reason to detain respondent and search his vehicle. *Scott*, 98 S.Ct. at 1724. *Also see, Whren v. United States*, 517 U.S. 806 (1996) (where this Court reaffirmed the position that a police officer's actual motivations cannot invalidate a seizure which is objectively justified); *Berkemer v. McCarthy*, 468 U.S. 420, 442 (1984) ("A police officer's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time.") As a result, Officer Kuykendoll's subjective beliefs are irrelevant since he and his partners complied with the principles set forth in *Terry v. Ohio*, 392 U.S. 1 (1968).

Furthermore, contrary to respondent's position, Petitioner has set forth compelling reasons to grant this petition. The opinion of the Appellate Court undermines the very purpose of the *Terry* decision because it prematurely halts the scope and duration of a **lawful** stop by failing to provide officers with the opportunity to dispel their reasonable fear that a suspect of a shooting left a gun in a vehicle. Respondent does not challenge the fact that similar scenarios are bound to occur throughout the country. Petitioner again urges this Court to take this opportunity to equip the police with the authority to perform a protective search of a vehicle where the officer has a reasonable belief that a weapon is hidden in that vehicle and that such a weapon poses a danger to investigating officers and others nearby.

CONCLUSION

The Petition for a writ of certiorari should be granted.

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